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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MOSES OBREGON, Defendant and Appellant.	G045220 (Super. Ct. No. 10NF3260) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Affirmed as modified.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Moses Obregon of conspiracy to commit robbery, robbery, felony false imprisonment and unlawful taking or driving of a vehicle. The court imposed a three-year prison term, consisting of the upper term for robbery plus a concurrent three-year term for false imprisonment. The court stayed sentence on the conspiracy and vehicle theft convictions under Penal Code section 654.[1]

Obregon claims the trial court erred by failing to strike the jury panel after a prospective juror talked to the prosecutor, admitting text messages between the coconspirators, and imposing sentence for false imprisonment. He also challenges his conviction for unlawful driving or taking of a vehicle, arguing the car was just one of the items taken during the robbery. We reject each contention and affirm the judgment.

FACTS

Mohomed Mustafa worked as unlicensed dealer in precious metals, jewels, and gems. His business had no storefront, and he advertised his services through various local newspapers and by having employees pass out business cards. He used an assumed name, Ricardo Gutierrez, and a dedicated business cell phone number to conduct his transactions. Generally, he went to the home of his clients and he usually brought a good deal of cash to these transactions.

Ihab and Diab[2] Ali are brothers and Mustafa's cousins. Diab operated a store front smoke shop, and he conducted an unlicensed precious metals business from this store. Mustafa once told Diab he carried a firearm on his leg to all his business appointments, which is something he did not do. Around June 10, 2010, Diab accused Mustafa of stealing business away from him, which caused some animosity between the cousins.

On June 21, at around 11:00 a.m., Mustafa received a phone call from a woman who identified herself as Ann Marie. She explained that another broker had

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1 All further undesignated statutory references are to the Penal Code.

2 We refer to the Ali brothers by their first names for clarity, not out of disrespect or bias.

appraised her jewelry and offered her $3,000, but she believed the jewelry was worth more. She thought the other broker was trying to take advantage of her because she was disabled. She had seen Mustafa's business card and wanted him to give her a second opinion. She and Mustafa agreed to meet around 4:00 p.m. A few minutes later, Ann Marie called back and changed the meeting place from her home to an address in an Anaheim apartment complex that she said was her son-in-law's home. That was fine with Mustafa because he was conducting other business in the area.

At about 3:00 p.m., Ann Marie called Mustafa and changed the appointment time from 4:00 p.m. to 6:00 p.m. She called again between 5:00 and 5:30 p.m. and said "she was running late and she was on her way . . . ." Shortly before 7:00 p.m., Mustafa received another call from Ann Marie and again she asked to delay the meeting.

Around 7:30 p.m., Mustafa drove to the address in Anaheim Ann Marie had given him and parked his black Ford Fusion in the apartment complex's parking lot. He was carrying over $1,200 in cash; he did not bring more because Ann Marie was a new customer. He walked to the designated apartment and knocked on the door. A man, later identified as Robert Cantu opened the door. Mustafa asked for Ann Marie. Cantu told him she was not there yet, but asked Mustafa to wait for her. Mustafa agreed and returned to his car. About 15 minutes later, Ann Marie called and said she was now in her son-in-law's apartment. She asked Mustafa to come back.

Mustafa walked back to the apartment at around 8:00 p.m. He noticed a man standing outside an apartment next door, but thought nothing of it. When he knocked on apartment door, Cantu opened the door just enough to show his face. Mustafa asked to see Ann Marie. Cantu said she was upstairs and backed away from the door. When Mustafa started to walk into the apartment, Cantu and two other men jumped Mustafa from behind. They repeatedly punched Mustafa in the face and body and jumped on his neck. One of them yelled, "The gun, the gun, the gun is in his leg.

Get the gun out of his leg[,]" while another put something in Mustafa's back and said, "If you don't listen, I'm going to kill you." Mustafa stopped struggling and dropped face-down onto the floor.

Once he surrendered, the men dragged Mustafa into the kitchen while keeping pressure on his neck and back to prevent him from looking around. They emptied his pockets and asked, "Where is all the money," apparently believing he had $10,000 with him. One of the men said, "It's probably in the car." Mustafa explained to them that he never took a great deal of money to a new client's home. He also told them he had a partner who knew about the deal and could make arrangements to deliver more money to them, although none of this was true. One of the men said, "Let me call his partner." Another said, "Shoot him in the legs so he doesn't follow us." One of the men threatened to kill Mustafa and his family if he contacted or cooperated with the police and another pointed out that they now had Mustafa's address and checkbook. They took his house keys and car keys, and they said they would search his home for money and other valuables.

As they were preparing to leave, the men decided to bind Mustafa to prevent him from following them. The apartment was vacant however so they had to resort to using shoelaces and a loose cord to tie Mustafa's hands and feet. They asked once more if Mustafa had any more money and then they told him to stay still for at least 10 minutes after they left the apartment.

Once Mustafa realized the men were not coming back, he worked himself free of the restraints and headed to his car, but his car had been stolen. He then decided to get some help at a nearby 7-Eleven. A patron loaned him a dollar to call a cab, and he took a cab to a friend's home. The friend drove him to his home in Ontario. During the drive, Mustafa called the police. After he checked on his home and had the locks changed, Mustafa returned to Orange County and eventually he went to an emergency

room for medical treatment for a concussion and severe contusions and abrasions to his face and body. The shoelaces and cord left deep red marks on his ankles and wrists.

Mustafa was able to identify Cantu, but he did not get a good look at the other two men. He gave general descriptions of them and said one of them had a heavy accent. However, he did get a good look at one of the assailant's shoes. They were distinctive athletic shoes, which he described as white tennis shoes with several accent colors.

During the ensuing investigation, police officers discovered that Obregon and Dawn Aguirre lived in the apartment next door to the vacant apartment where Mustafa had been beaten and robbed. When questioned about the incident, they said they knew nothing about it and had not been home when it happened.

Aguirre and Obregon were arrested on June 23. Investigators found a cell phone in their possession that had been used to call Mustafa on the day of the crime and to send text messages to phones found in the possession of Cantu and Ihab both before and after the robbery.[3] The text messages told a story.

On June 20th, Ihab texted Aguirre, "It's on[]" and "For today I just talk to my cuz." Aguirre responded, "Do U have to the gold to do the deal." Ihab replied, "Yes." Aguirre texted that "Mo" said they could meet, and then the two exchanged a series of texts arranging a meeting place for later that day.

On June 21, at 3:13 p.m., Ihab texted to Aguirre, "Did you guys call him" and asked her if she had found a spot. Aguirre replied, "There gona do this lick Ill get you some money KK." At 5:13 p.m., she texted Jordan Hernandez, an uncharged coconspirator, asking him "Do you know of an empty spot we'll give U money. Think

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[3] Obregon, Aguirre, Cantu and Ihab were jointly charged with conspiracy to commit robbery, robbery, false imprisonment, and vehicle theft. On the eve of trial, Cantu pled guilty to felony assault with force likely to produce great bodily injury, Aguirre pled guilty to conspiracy to commit robbery, and Ihab pled no contest to all charges in exchange for a grant of probation.

hard. Can't do Michelles." Then, at 5:25 p.m., she texted, "Jordan MO said please make the Hamburger Helper and mac n cheese he's tryn to find a spot."

A second cell phone, one the police could not connect with a specific person, started texting Aguirre at 6:30 p.m. Aguirre replied, "We're lookn for an empty apartment cuz th[e] dudes ready to meet up." Three minutes later, she texted, "Mo wil pay 2hundered bucks to whoever finds him an empty spot to do that lick." The receiver replied, "I will see wats up."

Around 7:30 p.m., Aguirre and Cantu exchanged texts. Aguirre wanted to know if "everything cleared outside[]," and Cantu replied, "Still[] has he called it's almost eight[]." At 7:55 p.m., Aguirre texted Cantu, "Not yet he might get here at 8:30."

And, at 12:41 a.m., after the robbery, she texted an unknown person, "Hey Mo said if UR awake can you wipe his shoes off." The following day, Aguirre and Cantu exchanged texts about getting rid of watches, calling someone identified as "Mr.," and Aguirre reminding Cantu to "bring th[e] thing I got[]."

Investigators discovered a videotape from a large retail store showing Obregon, Aguirre, and Cantu together at approximately 3:30 p.m. on June 21. Obregon and Aguirre are seen on the tape purchasing a prepaid cell phone.

Police officers located Mustafa's car about two days after the crime and 10 to 15 miles from where Mustafa had parked it. DNA was collected from the car's gear shift and from the Nike Air Jordans Obregon was wearing at the time of his arrest. A forensic scientist testified the DNA profile obtained from a blood spot on Obregon's shoe matched Mustafa's DNA profile. Obregon's DNA profile was found on the gear shift of Mustafa's car. Obregon was also carrying over $450, which included four $100 bills.

DISCUSSION

Jury Panel

On the first morning of jury selection, the court read the information and "admonished the prospective jurors as to their basic duties, function, and conduct." The

court repeated this admonition before the first recess and before releasing the panel for the day. The next morning, counsel told the court one of the prospective jurors had given the prosecutor a thumbs-up and told her, "Good job" as he drove his motorcycle from the courthouse the previous evening. The court brought all the prospective jurors into the courtroom and asked them who had driven a motorcycle to court the day before. One panel member raised his hand and identified himself as Mr. Rojas. The court excused all panel members except Rojas from the courtroom and asked Rojas if he had contacted the prosecutor in the manner described. Rojas admitted he had done so, and the court excused him from the panel.

When the remaining prospective jurors reentered the courtroom, the court reminded them of its previous admonition, specifically mentioning the warning against having contact with the attorneys involved in the case. The court explained Rojas had been excused for violating the court's admonition and then inquired if any member of the panel had talked to Rojas. One juror said Rojas had walked out of the courtroom after being questioned and said he had been excused because he had given the prosecutor a thumbs up the day before. Another juror recalled that Rojas told them he thought the lawyers were doing a good job.

After a few more questions to ensure no other juror had talked to Rojas about the case, the court admonished, "All right. Ladies and gentlemen of the potential jury, now that you all know that Mr. Rojas gave his thumbs up to one of our attorneys and felt that [the] attorney was doing a job worthy of a thumbs up, I am ordering each of you to disregard Mr. Rojas' opinion as to the merits of respective counsel. [¶] I'm ordering you not to let that have any bearing on this case, whatsoever. Clearly, Mr. Rojas' commentary has no bearing on Mr. Obregon's guilt or innocence or on the merits of the evidence." The court asked if anyone would not be able to disregard Rojas' comments or follow the court's instruction and no juror spoke. The court then stated, "If you are of that frame of mind, you are ordered to raise your hand and let me know so that

I may consider excusing you from this case and reassigning you to another case. If anybody feels that Mr. Rojas' commentary has any bearing on your ability to sit in judgment on this case, you are now ordered to raise your hand and let me know." None of the jurors responded. Defense counsel moved for a mistrial and the court denied the motion.

Obregon argues the court's failure to strike the entire panel violated his state and federal Constitutional right to due process of law and constitutes an abuse of discretion. We find neither error, nor cause to reverse the judgment.

"[T]he trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required." (*People v. Medina* (1990) 51 Cal.3d 870, 889 (*Medina*).) Thus, the trial court's determination "on the question of individual juror bias and prejudice is entitled to great deference and is reversed on appeal only upon a clear showing of abuse of discretion." (*People v. Martinez* (1991) 228 Cal.App.3d 1456, 1466; see also *People v. Nguyen* (1994) 23 Cal.App.4th 32, 41-42.)

Obregon argues the court should have discharged the entire panel after dismissing Rojas. However, "[d]ischarging an entire venire is a drastic remedy that should be reserved for the most serious cases; it is not appropriate simply because a prospective juror makes an inflammatory remark." (*Medina, supra,* 51 Cal.3d at pp. 888-889.) In *Medina*, prospective jurors stated (1) "'even his own lawyers think he's guilty,'" (2) "'they ought to have [*sic*] him and get it over with[,]'" and (3) "'bring the guilty S.O.B. in, we'll give him a trial, and then hang him.'" (*Ibid.*) These comments are not comparable to Rojas' conduct or his statement that both attorneys were doing a good job. Under the circumstances presented here, the court's remedial acts of interrogating and removing Rojas outside the presence of the entire panel, questioning the remaining panel members about their contacts with him and any bias that may have resulted, and its pointed admonition about what had transpired and order to disregard the information in

forming an opinion as to guilt or innocence, adequately protected Obregon's right to a fair trial. In short, Obregon fails to demonstrate the trial court abused its discretion by denying his mistrial motion, let alone that there was a violation of his constitutional right to due process.

Text Messages

As noted, the prosecution introduced several text messages between cell phones, some of which were discovered in the possession of various individuals involved in this crime. Obregon objected to the admission of the text messages on hearsay grounds. Following an Evidence Code section 402 hearing, the court ruled them admissible under the coconspirator exception to the hearsay rule. (Evid. Code, § 1223.)

On appeal, Obregon admits the contents of the text messages established a conspiracy between individuals to rob Mustafa, but argues "in the absence of [text messages] the preponderance of evidence did not establish that [he] was a member of the conspiracy." In arguing some if not all of the texts should have been excluded, he further contends it is reasonably likely he would have obtained a more favorable result absent the error. His argument is not persuasive.

While hearsay evidence is generally inadmissible (Evid. Code, § 1200), a hearsay statement is admissible against a party: "[I]f [¶] (a) [t]he statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [¶] (b) [t]he statement was made prior to or during the time that the party was participating in that conspiracy; and [¶] (c) [t]he evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence." (*Id.* § 1223.)

"A conspiracy is an agreement between two or more persons, with specific intent, to achieve an unlawful objective, coupled with an overt act by one of the conspirators to further the conspiracy. [Citation.] The conspiracy itself need not be

charged in order for Evidence Code section 1223's hearsay exception to apply to statements by coconspirators. [Citations.] Further, only prima facie evidence of a conspiracy is required to permit the trial court to admit evidence under Evidence Code section 1223; the conspiracy may be shown by circumstantial evidence and the agreement may be inferred from the conduct of the defendants mutually carrying out a common purpose in violation of a penal statute. [Citations.]" (*People v. Gann* (2011) 193 Cal.App.4th 994, 1005-1006.)

Here, there is ample circumstantial evidence of Obregon's involvement in the conspiracy to rob Mustafa. There had been bad blood between Mustafa and the Ali brothers. Within 11 days of their falling out, Aguirre, using an assumed name and information about how Mustafa does business, went to great pains to arrange a meeting with Mustafa. She claimed to have over $3,000 in jewelry in an attempt to get him to bring as much cash as possible. Aguirre and Ihab sent texts to each other before and after the robbery. On the day of the robbery, Obregon, Aguirre and Ihab were seen together purchasing a prepaid phone. Prepaid phones are not readily traceable to a particular person and provide some amount of anonymity. And, as the various texts suggested, Mustafa was lured to a vacant apartment, which was next door to the apartment Obregon and Aguirre shared, and he was jumped by three men who thought he carried a gun, something Mustafa only mentioned to Diab, Ihab's brother.

Two days later, Obregon was arrested and investigators discovered a spot of Mustafa's blood on one of his pair of distinctive athletic shoes. Further, Obregon's blood was found in Mustafa's stolen car. While Obregon asserts there could be many explanations for the blood evidence, none of them are as likely as the one posited by the prosecution, namely that he participated in the conspiracy to rob Mustafa and the beating that was part and parcel of this conspiracy. "[W]hether statements made are in furtherance of a conspiracy depends on an analysis of the totality of the facts and circumstances in the case." (*People v. Hardy* (1992) 2 Cal.4th 86, 146.) Under this

standard, the facts presented support the trial court's decision to admit the text messages in evidence during Obregon's trial under the coconspirator exception to the hearsay rule.

Multiple Convictions and Section 954

Obregon relies on "the rule prohibiting multiple convictions" to argue the fact the keys to Mustafa's car were taken during a robbery preludes his conviction for both the robbery and for unlawful taking or driving Mustafa's car. His reliance is misplaced.

An accusatory pleading may charge different statements of the same offense. (§ 954.) Yet, as a general rule, "a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged." [Citations.]' [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227 (*Reed*).) However, "A judicially created exception to the general rule permitting multiple convictions 'prohibits multiple convictions based on necessarily included offenses.' [Citation.] '[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*Id.* at p. 1227.) Although two tests have traditionally been applied to determine whether one offense is necessarily included within another, the "elements" test and the "accusatory pleading" test, in *Reed* the California Supreme Court held the elements test must be applied to make a determination of when a defendant may sustain multiple convictions based on the charged offenses. (*Id.* at pp. 1229-1231.)

The elements of robbery are the taking of personal property from a person or the person's immediate presence by means of force or fear, with the intent to permanently deprive the person of the property (§ 211; *People v. Marshall* (1997) 15 Cal.4th 1, 34.) The elements of Vehicle Code section 10851 are the taking or driving of a vehicle without the owner's consent and with the intent to permanently or temporarily deprive the owner of title or possession to the property, with or without the intent to steal.

(Veh. Code, § 10851, subd. (a).) "[Vehicle Code] section 10851 'proscribes a wide range of conduct,' and includes both a theft and nontheft form of the offense." (*People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*).)

Comparing the elements of the two offenses demonstrates that a defendant who has committed robbery has not necessarily committed the Vehicle Code section 10851 offense because a robbery can be committed without stealing a vehicle. This precise principle has long been recognized by the California Supreme Court. (*People v. Marshall* (1957) 48 Cal.2d 394, 399 (*Marshall*.) In *Marshall,* the court applied the elements test and determined that robbery did not necessarily include a Vehicle Code section 503 offense (the predecessor statute to Vehicle Code section 10851) because any kind of personal property may be taken in a robbery, whereas only the taking of a vehicle is prohibited under the Vehicle Code offense. (*Marshall, supra,* at p. 399; see also *People v. Green* (1996) 50 Cal.App.4th 1076, 1084; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 419.)

Obregon acknowledges the application of the elements tests means "a defendant who has committed robbery has not necessarily committed the Vehicle Code section 10851 offense . . . ." However, he urges us to following what he characterizes as a "rule" that a defendant "may not be convicted for more than one offense based upon taking multiple items of property during a single robbery," citing *People v. Ortega* (1998) 19 Cal.4th 686 (*Ortega*). We are not persuaded.

The *Ortega* court considered whether grand theft of an automobile (§ 487, subd. (d)(1)) is a lesser included offense of robbery. The court found grand theft of an automobile to be a necessarily included offense of robbery even though "robbery can be committed without taking an automobile." (*Ortega, supra,* 19 Cal.4th p. 698, overruled on other grounds in *Reed, supra,* 38 Cal.4th at p. 1224.) The court held grand theft of an automobile was merely a degree of a theft and therefore necessarily included within robbery. (*Id.* at pp. 696-697.) However, unlike the Penal Code provisions analyzed in

Ortega, Vehicle Code section 10851 does not define merely a degree of theft. Rather, it defines an offense distinct from general theft. As stated in *People v. Montoya* (2004) 33 Cal.4th 1031, "The offense of unlawfully taking a vehicle, defined in Vehicle Code section 10851, subdivision (a), is sometimes called 'vehicle theft." Because the crime requires only the driving of a vehicle (not necessarily a taking) and an intent only to temporarily deprive the owner of the vehicle, it is technically not a 'theft.' [Citations.]" (*Id.* at p. 1034, fn. 2; see also *Garza, supra,* 35 Cal.4th at p. 876.) *Ortega's* grand theft analysis is therefore of little utility.

Section 954 sets forth the general rule permitting multiple convictions, and judicially created exceptions to this rule should not be interpreted broadly because to so contravenes "the legislative policy permitting multiple convictions." (*Reed, supra,* 38 Cal.4th at pp. 1227, 1231; *People v. Sloan* (2007) 42 Cal.4th 110, 118-120.) In short, Vehicle Code section 10851 is not a lesser included offense of robbery, a point that distinguishes this case from *Ortega* and leads to a different result. This distinction obviates the need to discuss several other cases Obregon cites involving convictions for robbery and grand theft of an automobile under section 487.

Sentencing and Section 654

At the sentencing hearing, the court chose the robbery count as the principle term and imposed the midterm sentence of three years. On the remaining subordinate terms, the court imposed a concurrent three-year term for false imprisonment and stayed sentence for conspiracy to commit robbery and vehicle theft pursuant to section 654, noting that "if upon appellate review the court does find that this court erred, then it would be this court's intent to stay [the false imprisonment] count also under [section] 654."

Obregon argues "unless the robbery conviction is reversed [], the concurrent term for false imprisonment must be stayed" pursuant to section 654. He asserts "[r]restraining the victim served to facilitate completion of the robbery [and] was

therefore incidental to the robbery." He points to the prosecutor's argument that criminal liability for the robbery could attach if the jury found Obregon a participant in the restraining of Mustafa, or if the restraint was a natural and probable consequence of the conspiracy to commit robbery. The Attorney General counters the false imprisonment took place after Obregon and his coconspirators had accomplished the planned robbery and was not incidental to it. We find Obregon's position persuasive with respect to the application of section 654.

Section 654 permits an act or omission made punishable in different ways by different provisions to be punished under either of such provisions, "but in no case shall [it] be punished under more than one . . . ." Section 654 bars multiple punishment when a defendant is convicted of two or more offenses that are incident to one objective. (*Neal v. State of California* (1960) 55 Cal.2d 11; *People v. Latimer* (1993) 5 Cal.4th 1203 [reaffirming *Neal*].) "Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) But we do not just rubber stamp it.

Here, the trial court did not articulate a separate objective that might have been accomplished by binding the victims and we are unable to imagine one. The case law is replete with cases where courts found a separate objective where acts of violence were concerned, but we've found none where anyone has put forth any objective accomplished by binding the victims of a robbery other than facilitation of the robbery. In our case, the decision to bind Mustafa came as the robbers realized they needed to escape from the apartment. They used items readily available to tie his hands and feet, which suggests on-the-spot inspiration and not planning. Although they had severely

beaten him and threatened his life and the lives of his family members, the act of binding Mustafa's hands and feet did nothing but ensure he would not mount an immediate pursuit, seek help, or report the robbery to police. Under this set of facts, the false imprisonment merely served to facilitate the robbery and – as the trial court suspected it might –section 654 prohibits punishment for both crimes.

DISPOSITION

The judgment is modified to stay execution of sentence on count III, false imprisonment, pursuant to section 654. As modified, the judgment is affirmed. The trial court is directed to correct its minutes to reflect section 654 stay on count III. The court is further directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.